Supreme Court, U.S.
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No. 93-927

In The

Supreme Court of the United States

October Term, 1993

THE DIRECTOR OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT,

Petitioner,

v.

ROBERT PATRICK GUIMONT, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF FACTS

As invited by Rule 15.1, the following are perceived misstatements of fact in the State's petition which have a significant bearing on the issues presented.

(1) The statements on page 4 of the petition that "tenants lose both their housing and their investment when forced to relocate" and that tenants are at "a distinct economic disadvantage when a park owner decides to close a park" are the argumentative conclusions of the State's attorneys and are not legislative findings because the Acts in question contain no statement of purpose or legislative findings.

(2) On page 5 of its petition, the State correctly summarizes the requirements of the Acts and notes that section 2, subsection 6, of the 1990 Act requires the park owner to pay the full amount of assistance to low income tenants if there are insufficient monies in the state fund. The State omits the fact that the legislature never appropriated money to the fund and as a result it was broke when the intervenor, Bear Creek Associates, closed its park and was required to pay tenants the full amount of relocation assistance in the sum of $108,000.

(3) The State refers to a fee imposed by the 1990 Act on transfers of titles of mobile homes, $50 of which went to the state fund. The State then says: "Through the title transfer fee, the burden of relocation assistance was spread over the entire industry, not just onto park owners." (page 5 of petition) That statement is patently untrue because the state Acts expressly require payments by park owners independent of the fund, and Bear Creek

Associates singly bore the burden of relocation assistance on closure of its park without help from the industry.

(4) It is significant, but not mentioned by the State, that the 1990 Act required that "the park-owner shall pay park tenants who do not qualify as low-income tenants the same amount of relocation assistance that low income park tenants are entitled to from the park-owners under this section." Section II, subsection (7), of the Act set forth in Appendix F-5 of petition. Thus, as the price of going out of business, a park owner may be required to pay relocation assistance to some tenants who are in better financial shape than he is.

(5) The State cites *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 909 (1990), *cert. denied* 498 U.S. 911 (1990), as an example of how "the Washington State Supreme Court has used the vague contours of the due process clause to invalidate economic regulations more times in the past three years than the United States Supreme Court has in the past 55 years." (Footnote 6 on page 11 of petition.) *Presbytery* is a poor example because the regulation in that case was upheld by the court.

ARGUMENT

The State's petition raises questions only as to the State Supreme Court's decision based on due process. It does not deal with the Washington State Supreme Court formulation of its own unique rule on the takings issue, challenged in respondent's cross petition as inconsistent with decisions of this court.

1. *The decision in Guimont v. Clarke,* 121 Wn.2d 586, 854 P.2d 1 (1993), *is consistent with decisions of the United States Supreme Court on the due process issue.* The State's petition does not meet the criteria for review by the United States Supreme Court set forth in Rule 10 because the decision of the Washington State Supreme Court on the issue of due process is consistent with decisions of this court. See footnote 10 to the court's opinion set forth in Appendix A-31 of the petition, citing *Lawton v. Steele,* 152 U.S. 133, 137, 38 L.Ed. 385, 14 S.Ct. 499 (1894), and *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 8 L.Ed. 2d 130, 82 S.Ct. 987 (1862), which require the means of accomplishing a legislative objective to be "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

That rule has never been overruled by this court. To the contrary, in 1962 in *Goldblatt v. Town of Hempstead* this court said the "Classic statement of the rule in *Lawton v. Steele* [citation omitted] is still valid today." In 1987 Justice Brennan in *Nollan v. California Coastal Commission,* repeated the statement that the rule in *Lawton v. Steele* "is still valid today." 483 U.S. 843, footnote 1. Since the state court decision is consistent with decisions of this court on the due process issue, there is no basis for review by this court.

2. *The rule of Lawton v. Steele should remain intact.* The State now asks this court to eliminate the rule set forth in *Lawton v. Steele,* arguing that statements in such cases as *United States v. Carolene Products Co.,* 304 U.S. 144, 82 L.Ed. 1234, 58 S.Ct. 778 (1937), *Ferguson v. Skrupa,* 372 U.S. 726, 10 L.Ed. 2d 93, 83 S.Ct. 1028 (1963), and

General Motors v. Romein, 112 S.Ct. 1105 (1992), render the rule of *Lawton v. Steele* out of date.

The State contends that the courts will not review "economic regulations" but defer to the legislature. Close examination of the cited cases discloses that they do not support the broad conclusions which the State draws from them. For example, in *Carolene Products* the court upheld a regulation prohibiting interstate shipment of adulterated milk products. The decision was not based solely on a presumption of constitutionality of the statute. The court said: "Affirmative evidence also sustains the statute" and the court described that evidence as showing that "the use of filled milk as a substitute for pure milk is generally injurious to health and facilities fraud on the public." 304 U.S. 148 and 149. *Ferguson v. Skrupa* upheld a Kansas statute which restricted "debt adjusting" to lawyers. In discussing an equal protection argument the court did not rely solely on a conclusive presumption of the propriety of legislative acts but listed factual reasons why a non-lawyer cannot perform the service to the same standards which a lawyer can. In *General Motors v. Romein* the court said that due process requires economic legislation to have a legitimate legislative purpose furthered by rational means. In footnote 7 on page 13 of its petition, the State quotes a portion of the court's statement but omits the following, which is particularly relevant to this case:

> Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation because it can deprive citizens of legitimate expectations and upset settled transactions.

112 S.Ct., at 112. That statement is relevant to this case because the Relocation Assistance Act imposed on park owners retroactively a price for going out of business which did not exist when they went into business, a factor the Washington State Supreme Court mentioned in its opinion. See Appendix A-35 and A-36 in petition. It is significant in that case that the court does review "economic legislation" to see that the *means* selected to accomplish a legislative *objective* are fair and reasonable. This court has said that fairness and justice bar government from forcing some to bear a public burden which should be shared by all. *Armstrong v. U.S.*, 364 U.S. 40, 41 L.Ed. 2d 1554, 80 S.Ct. 1563 (1960).

The state Act in this case does not fit the category of "economic regulation" as used by the State in its petition. The Act recites no public evil which it purports to eliminate and contains nothing which "regulates" park owners' conduct. Instead, it purports to enact a public welfare program at the expense of a few. As a price of going out of the mobile home park business, park owners are required to pay tenants, including even those who are not in financial need.

The State repeatedly claims that the State Supreme Court improperly used a "worst case scenario" to invalidate the state Act. Although the court gave an example of a worst case, it immediately explained that under *any* circumstance the state Act by its express language imposes on park owners an unreasonable duty. That portion of the State Supreme Court's opinion might be characterized as a "best case scenario" because at the same time the State compelled park owners to pay the full

amount of relocation assistance "when there are insufficient monies to meet the demand for relocation assistance," it failed to appropriate any money to the "state fund." See Appendix F-5 of petition. Describing that "best case scenario," the court said:

> Even if the fund has sufficient resources to share the burden, the Act still requires park owners to pay large sums of money, the amount of which will vary depending on how much notice the park owner gives to the tenants. Moreover, the Act does not limit the payment of relocation assistance to those who have a low income. Although tenants who do not meet the Act's definition of "low income" are not entitled to payments from the fund, they are entitled to receive the same payments made directly by the park owners to low income tenants. Thus, park owners must directly pay relocation assistance even to those tenants who are not financially burdened.
>
> We also note the Act's provisions are permanent in nature.

See Appendix A-35 of petition. Under a "best case scenario" the state Act is unreasonable, unfair and unduly oppressive on park owners.

3. *The national public policy of government fairness and justice requires preservation of the constitutional prohibition against government acts which are "unduly oppressive" on a few.* The State seems to argue that the public policy of the United States now requires the Supreme Court to announce a rule that in challenges to state enactments under the due process clause the court will accept the propriety of economic legislation if the court can imagine

any state of facts which can sustain it without regard to the impact on an individual or a few as to whether it is unduly oppressive on him or them.

As expressed in both the takings and due process clauses, our national public policy requires government to treat every person with fairness and justice, and the courts cannot abdicate this constitutional duty to see that that public policy is carried out. That public policy is designed to prevent government from becoming tyranny. That public policy requiring all persons to be treated with fairness and justice has a great historical tradition traced from the Magna Charta in 1215.[1]

Supreme Court decisions dealing with *due process* have repeatedly described fairness and justice to be its essence. *International Shoe Co. v. Washington*, 326 U.S. 310, 91 L.Ed. 95, 66 S.Ct. 154 (1945); *Giacco v. Pennsylvania*, 382 U.S. 399, 15 L.Ed. 2d 447, 86 S.Ct. 518 (1966); *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 94 L.Ed. 381, 70 S.Ct. 403 (1950), referring to " . . . those deeply rooted notions of justice which the Due Process Clause expresses." 338 U.S., at 617. In *Daniels v. Williams*, 474 U.S., 88 L.Ed. 2d 662, 106 S.Ct. 662 (1986), the Court repeated that "the touchstone of due process is protection of the individual against arbitrary action of the government" and that due process "serves to prevent governmental power from being used for purposes of

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[1] "While this provision of the Amendment (Fourteenth) is new in the Constitution of the United States as a limitation on the power of the States, it is old as a principle of civilized government. It is found in Magna Charta . . . " *Munn v. Illinois*, 94 U.S., at 123.

oppression." In *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 57 L.Ed. 1427, 33 S.Ct. 1033 (1913), the court said:

> Without the guaranty of "due process," the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that chapter (Two Coke Inst., 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing. 230 U.S., at 161.

There is in the State's petition an innuendo in its reference to "economic legislation" that "property rights" are entitled to less protection than "individual rights." There is no such thing as "property rights," there are only "individual rights," a distinction explained by this court in *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 31 L.Ed. 2d 424, 92 S.Ct. 1113 (1972):

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the

> other. That rights in property are basic civil rights has long been recognized.

Justice Holmes described the reason: "Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight." *Davis v. Mills*, 194 U.S. 451, 457, 48 L.Ed. 1067, 24 S.Ct. 92 (1904).

The *takings* clause is based on the same principle of fairness and justice. Thus, it is said that the purpose of the takings clause is "to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 41 L.Ed. 2d 1554, 80 S.Ct. 1563 (1960); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 96 L.Ed. 2d 250, 107 S.Ct. 2378 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwick*, 449 U.S. 155, 66 L.Ed. 2d 358, 101 S.Ct. 446 (1980). The court has indicated that fairness and justice bar the government from singling out one or a few to remedy a public problem. *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed. 2d 677, 107 S.Ct. 8141 (1987). In a dissenting opinion in *Pennell v. San Jose*, 485 U.S. 1, 99 L.Ed. 2d 1, 108 S.Ct. 849 (1988), Justice Scalia explained that one or a few landlords do not create tenants' poverty any more than the rest of society does and that those landlords should therefore not be singled out to provide a welfare program for poor tenants. He warned that if a principle is established that one or a few can be singled out to provide remedies to public problems which they do not cause or benefit from, "there is no end to the social transformations that can be accomplished by so-called 'regulation' at great expense to the

democratic process" because that process can be achieved "off budget" invisibly and thus with relative immunity from normal democratic processes. 485 U.S. at 22.

The national public policy should be preserved protecting the few from government demands that they solve public problems which society in general has created. The Washington State Supreme Court in *Guimont v. Clarke* properly applied the federal cases which implement that public policy under the due process clauses.

CONCLUSION

The State's petition should be denied.

Respectfully submitted,

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